UNITED STATES
v.
JOHN C. MORTON, ET AL.

IBLA 77-305 Decided September 27, 1977

Appeal from decision of Administrative Law Judge holding mining claims null and void. CA 2836.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and is present within the limits of the claim.

3. Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery, a prima facie case has been established.

APPEARANCES: John C. Morton, pro se; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

John C. Morton, for himself and his associates, has appealed from a decision, dated March 2, 1977, wherein Administrative Law Judge R. M. Steiner declared the Tabor (a/k/a Taber) placer mining claim and the Morning Star Association placer mining claim null and void for the reason that there is no discovery of a valuable mineral deposit within the limits of either claim.

The appellant contends, essentially, that his constitutional rights have been violated, that his evidence preponderated over that submitted by the Government, that there was collusion or connivance between the Forest Service and the Department of the Interior to eliminate him as an independent miner while not contesting neighboring claims, and that the Judge did not recognize the evidence from the contestees. Appellant also tendered additional documents intended to augment the evidence he presented at the hearing.

The Board of Land Appeals has the authority to conduct a review de novo of the entire record on an appeal from a decision of an Administrative Law Judge. United States v. Rigg, 16 IBLA 385 (1974).

In this case we find that the Forest Service requested the Bureau of Land Management to issue a complaint against the Tabor (a/k/a Taber) and the Morning Star Association placer mining claims, situated in portions of sections 24, 25, T. 22 N., R. 9 E., sections 19, 30, T. 22 N., R. 10 E., M.D.M., Sierra County, California, charging that there are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery and that the land embraced within the claims is nonmineral in character, and praying that the mining claims be declared null and void. The contest complaint named John C. Morton as sole contestee, and was served on him May 6, 1975. Morton submitted a timely answer denying the charges, and named seven other persons alleged to be interested parties in the Morning Star Association placer mining claim. Subsequently these persons: Dancing Bear Morton, Dudley R. Morton, Dudley C. Morton, Patricia Morton, Robert Harkey, Anita Harkey, and Marilyn Martins, were served with notice of the contest. Each replied, denying the charges and naming John Morton, a member of the Association, to act as his or her representative in the proceeding. Thereafter the matter came on for a hearing before Administrative Law Judge R. M. Steiner, in Sacramento, California, on April 14, 1976. At the hearing, the contestees were represented by John C. Morton, pro se, and for his associates; the Government was represented by Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture.

Appellant charges that the "hearing officer is working in collusion with the Department of the Interior and the Forest Service in order to effect a legal semblance for justification of removal of independent miners from the public domain." We find no merit in this contention.

The Secretary of the Interior is charged with seeing that valid mineral claims are recognized, invalid ones eliminated, and the rights of the public preserved. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). It is well established that this Department may determine the validity of mining claims by administrative contest proceedings which provide the claimant the right to a hearing before a qualified hearing officer (Administrative Law Judge). See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920). The motivation of any government agency in initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims, and not of others in the same general area, does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal, and where that issue is presented, mining claims properly are declared null and void upon a showing of lack of discovery of a valuable mineral deposit upon the claims. United States v. Howard, 15 IBLA 139 (1974). The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act (APA) and the due process clause of the Constitution. Best v. Humboldt, supra; United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974); United States v. Dummar, 9 IBLA 308 (1973). Judge Steiner has been certified by the Civil Service Commission as qualified to conduct hearings under the Administrative Procedure Act (APA), 5 U.S.C. § 556 (1970). The procedures followed in this contest proceeding comported with the APA and the requirements of due process of law in the Constitution. United States v. Stevens, supra; United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972). The fact that a hearing in a mineral contest is conducted by an Administrative Law Judge employed by the Department of the Interior, that the Government's case is presented by a witness and by an attorney employed by the Department of Agriculture, and that appellate review is conducted by employees of the Department of the Interior does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or an expert witness employed by the Government, or a member of this Board reviewing the Judge's decision, on a charge of collusion or bias there must be a substantial showing of actual and personal bias, and not merely innuendoes. Cf., United States v. Stevens, supra. A Forest Service mineral examiner is not to be disqualified as a witness against a mining claim within a national forest nor his testimony discredited merely because he is an employee of that agency. United States v. Zerwekh, 9 IBLA 172 (1973). A hearing officer is not disqualified nor will his findings

be set aside in the absence of a showing of bias. United States v. Converse, 72 I.D. 141, aff'd Converse v. Udall, 399 F.2d 616 (9th Cir. 1968); cert. denied, 393 U.S. 1025 (1969).

From our review of the entire record in this proceeding it is apparent that Morton did not, and does not, understand or comprehend the significance of the contest proceeding. And it seems the Government did not include all the unpatented mining locations and the claimants thereto in its complaint so as to eliminate such unpatented mining claims in conflict with its management plans. At the outset of the hearing Morton asserted that he had made the location for the Morning Star Association placer mining claim in May 1974 to embrace the land encompassed by the "Taber Mine," as an assumed "trustee" for one Lulu Taber, who, he alleged, was the owner of the unpatented mining claims comprising the "Taber Mine." He suggested that he and his associates anticipated receiving title to the "Taber Mine" under the will of Mrs. Taber, so his action in the location of the Morning Star Association claim was to protect the present interests of Mrs. Taber, as well as the prospective interests of himself and associates, in the "Taber Mine" (Tr. 3). He offered no evidence in support of his statements that he was a "trustee" (Tr. 4). He admitted that he had been occupying the land in question and maintaining a cabin thereon while working on the "Taber Mine," and asserted authority for the cabin from the validity of the "Taber Mine." He stated he had done assessment work for the claims in the "Taber Mine" in 1970 and 1971, but had not recorded either proof. He conceded that he had no discovery of a valuable mineral deposit on either the Morning Star Association claim, or the unrecorded Taber claim, and agreed to stipulate to the relinquishment of these claims (Tr. 11, 12). Because of the confusion stemming from the "Taber Mine" purportedly owned by Lulu Taber, not a party to this contest proceeding, and the unrecorded Taber (a/k/a Tabor) claim located in May 1974, the Judge ruled that these proceedings were against only the Morning Star Association claim and the Taber (a/k/a Tabor) claim, each located by John C. Morton in May 1974; no interests of Lulu Taber were included in the contest and Lulu Taber would not be bound by any decision following the hearing (Tr. 16, 17). After concession by the contestee Morton that he had no discovery on the claims in contest, counsel for the Government moved to amend the prayer in the complaint to have the land embraced within the Morning Star Association placer mining claim and the Taber (a/k/a Tabor) placer mining claim determined to be nonmineral in character as set forth in Charge 5(b), in addition to a declaration that the claims are null and void as set forth in Charge 5(a) of the complaint. As the contestee had conceded the truth of Charge 5(a), and made no objection to the motion, the Judge accepted the motion and permitted the amendment to the prayer in the complaint (Tr. 14).

In view of the willingness of the contestee to stipulate there was no discovery on his claims and to relinquish them, we find it

difficult to understand why the Judge received further evidence and testimony before declaring the subject claims null and void. The Judge did succinctly summarize the evidence in his decision, as follows:

> Henry W. Jones, after having been duly qualified as a mining engineer, testified that he had examined the subject claims. The Morning Star Association placer mining claim was located on May 29, 1974. (Exhibit A). On June 26, 1974, accompanied by Max Donner and John Morton, he found the portal of the Taber tunnel. He found a location notice dated May 1974, posted for the Taber placer mining claim, signed by John C. Morton. Mr. Morton advised him that the location notice had not been recorded. He had prepared Exhibit C which depicts the subject claims, a mine building situated at the mouth of the Taber tunnel together with other buildings, and the Taber tunnel, approximately thirty-five hundred feet long. He stated:
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> > I might add, on this Exhibit C, I was never shown the location notice to the Morning Star Association placer claim. I don't know the discovery points to this particular claim.
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> > As a matter of fact, Mr. Morton told me at the time we examined the claim that the discovery point was inside the Taber tunnel way in, and he could not show me the discovery point or any place where I could sample. And he wouldn't allow me to sample inside the claim. (Tr. 43).
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> On April 9, 1976, he observed some additional work below the portal of the Taber tunnel. He found a cement dam which had been breached. Tailings piled behind the dam were washed through a 45-foot sluice box. He sampled the tailings that were run through the sluice box and found a small speck of gold in a series of five pans. He sampled various spots along Gibson Creek and found no gold colors. The tunnels are caved so tightly shut that it would take a long period of time to open them up if they could be opened at all.
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> Based upon his examination, it was his opinion that a prudent person would not be justified in spending time, effort, and money on the claims with a reasonable hope of developing a paying mine.

Leroy Post testified that he had worked in several mines in the La Porte district. He saw a drift in the Taber tunnel in 1929-1930 when it was cleaned out. They had opened a branch tunnel "that run into a dike." "That was about the last work they done in there." (Tr. 69). The mine did not operate very long after that. He hauled casings into the tunnel to bore holes. He did not see the results of test holes, and the tunnel has not been reopened since its closure.

Joseph Malouin testified that there have been two or three attempts at mining in the past thirty-six years in the general district of "Whiskey Diggings". He observed that John Morton had done work preparatory to opening up the Taber mine.

John Morton testified that he pointed out to Mr. Jones on a map of the Taber mine, Bore Hole No. 3 which was the discovery point. The discovery point was not the portal of the tunnel. Since June 1972, he had been studying mining, resumed work on the Taber Mine, and worked also at the Porter Hill Mine. He had an enormous amount of mining engineering knowledge and experience. In 1973, he started development work. In 1974, he started cleaning and draining the sediment pond. In 1975, he bulldozed a road to the claim. The witnesses who were present when the material was pulled from the bore hole are deceased. The drill hole was 395 feet deep. "* * * I can almost guarantee you that within two years I will be pulling gold out of that channel." (Tr. 78).

On cross-examination, he stated that the virgin channel runs from two to six million dollars per mile. Since 1970, he had removed eighty or ninety yards of material from the face of the mine, including the sediment pond. He intended to follow seven hundred feet on the main Taber tunnel and about three hundred feet on a branch ending at a lava dike. It will be necessary to go through the lava dike to find the virgin gravel. He should reach the channel again after about three hundred feet. There is no shoring in the tunnel. All of the equipment was left in the tunnel. He had not taken any assays. "I can't assay it until I get into it. You can't assay where they have worked already." (Tr. 81).

The Contestees submitted in evidence fifteen exhibits including maps, correspondence, copies of publications, options to purchase, and mineral reports, all of which have been carefully reviewed.

Among the exhibits submitted by Morton are maps of the claims within the "Taber Mine," the area which he professed was included in the Morning Star Association claim. Also introduced were copies of correspondence in the 1950's between Mrs. Lulu Taber and her counsel relative to possible patent proceedings for the "Taber Mine" claims, and they show the unequivocal advice from counsel that "it would be a crime for us to encourage you to begin patent proceedings * * * when you do not have any workings open for sampling by the Govenment." The correspondence indicates that the "Taber Mine" claims were located or relocated between 1911 and 1923. Other exhibits from Morton include unsupported data relative to the "Taber Mine," copies of miscellaneous reports in California State publications and local newspapers relative to activity in the "Taber Mine" in 1930, 1931 and 1932, as well as an unexercised purchase option to the "Taber Mine" given in 1934. Interesting though these exhibits are, none of them is related to either of the claims under contest, as each of those claims was located in May 1974, and neither was suggested as a replacement, relocation or other displacement of the unpatented claims in the "Taber Mine." At best, the exhibits, or some of them, indicate that the land encompassed by the claims in question was of mineral character in the past.

One might draw the conclusion that the evidence and testimony from both parties were directed at the validity of the claims comprising the "Taber Mine," but as the Judge stated at the very outset, those claims ostensibly owned by Mrs. Lulu Taber were not included in this proceeding.

[1] The discovery of a valuable mineral deposit with the limits of a mining claim is the sine qua non for a valid location. 30 U.S.C. § 23, 35 (1970). A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, supra. This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, supra; Converse v. Udall, supra.

To establish the existence of a valuable mineral deposit on a claim there must be proof of continuous mineralization through the rock, the mere showing of disconnected small pods of mineral concentration, even of high values, does not satisfy the test. United States v. Zerwekh, supra; United States v. Consolidated Mines and Smelting Co., A-30760 (September 19, 1967). While geologic inference based upon knowledge of the degree of mineralization prevalent within the surrounding area cannot be substituted for the actual exposure of a mineral deposit within a claim, it may be relied upon

as an aid to calculate the extent and potential value of the mineral deposit, once the mineral-bearing minable material has been exposed. United States v. Henault Mining Co., 73 I.D. 184 (1966), aff'd, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

[2] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; then the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It is thus crystal clear that the mining claimant is the proponent of an order to declare his claim valid, so that, pursuant to the APA, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of non-persuasion. Foster v. Seaton, supra; United States v. Arcand, 23 IBLA 226 (1976).

[3] The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and found the mineral values exposed as being insufficient to support the finding of discovery. United States v. Arcand, supra; United States v. Hallenbeck, 21 IBLA 296 (1975). The mineral examiner's conclusion must be based upon reliable, probative evidence, United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971), but the examiner is not required to perform discovery work, or to conduct drilling programs for the benefit of the claimant. United States v. Garner, 30 IBLA 42 (1977); United States v. MacIver, 20 IBLA 352 (1975).

The testimony of the Government's mining engineer that he had examined the Morning Star Association claim (and the unrecorded Taber Claim) and had found but a single speck of gold in the samples panned from various representative sites and from old tailings constitutes a prima facie case that no discovery exists within the limits of the claim. The contestees simply did not present any credible evidence to overcome the Government's prima facie case, and furthermore, Morton declared that no demonstrable discovery had been uncovered within the limits of the claim. The Administrative Law Judge properly held the claims to be null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge holding the Morning Star

Association placer claim and the unrecorded Taber (a/k/a Tabor) placer claim null and void is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Joseph W. Goss
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge